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Petitioners,

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

BRIEF *AMICUS CURIAE* OF CALIFORNIA REDEVELOPMENT ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the Takings Clause of the Fifth Amendment forbid an economically distressed city from employing its eminent domain power to condemn, and pay just compensation for, private property in order to reverse decades of economic decline, create thousands of jobs and significantly increase property taxes and other sources of revenue for the city, and to realize immediate structural and environmental benefits for the city, as long as the proposed condemnation is rationally related to the accomplishment of those goals?

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INTEREST OF AMICUS CURIAE

Amicus curiae California Redevelopment Association ("CRA") is a California nonprofit corporation whose members include redevelopment agencies and private sector firms and individuals interested in redevelopment in California.[1] Currently, 324 redevelopment agencies and 264 private sector firms are members of CRA. CRA's members are involved in carrying out redevelopment plans throughout the state. California's Community Redevelopment Law (California Health & Safety Code §§ 33000 – 34160) was adopted in 1945. Since that time, approximately 414 cities and counties have established redevelopment agencies and have adopted approximately 772 redevelopment plans. All but a few of those redevelopment plans authorize the use of eminent domain to acquire some or all of the property within the redevelopment project area in order to eliminate conditions of blight.[2]

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[1] All parties have given written consent to the filing of this brief and copies of the consent letters are on file with the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that counsel for the parties did not author this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] California redevelopment agencies are authorized to exercise the power of eminent domain by California Health and Safety Code section 33391. The California legislature has declared it to be the policy of the state: "That whenever the redevelopment of blighted areas cannot be accomplished by private enterprise alone, without public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, in the work of clearance, and in the making of improvements necessary therefor, it is in the public interest to employ the power of eminent domain, to advance or expend public funds for these purposes, and to provide a means by which blighted areas may be redeveloped or rehabilitated." Cal. Health & Safety Code § 33037(b).

SUMMARY OF ARGUMENT

For the reasons set forth in Respondents' Brief, CRA firmly supports Respondents' contentions that: (1) economic development is a public use for which the power of eminent domain may be constitutionally exercised, and (2) there is no basis in the Constitution for applying a more stringent standard of judicial review to takings for economic development purposes.

Although the constitutional question presented by this case does not appear to impact takings by redevelopment agencies for the purpose of eliminating blight, CRA feels impelled to call to the Court's attention the serious implications that Petitioners' arguments may have for takings of non-blighted properties within blighted areas. Petitioners' assertion that "there is nothing in the act of condemning non-blighted properties that constitutes a public purpose" (Petitioners' Brief at 26) overlooks this Court's holding in *Berman v. Parker*, 348 U.S. 26 (1954). Berman clearly held that blight is determined on an area basis – not a parcel-by-parcel basis – and that a blighted area may include non-blighted properties which are necessary to effectively redevelop the area as a whole. Moreover, Berman held that the power of eminent domain may be used to acquire non-blighted property within a blighted area. This holding of Berman is critical to the ability of redevelopment agencies to continue to deal effectively with eliminating conditions of blight which threaten the physical, social and economic health of California's communities.

ARGUMENT

I. The Condemnation of Non-Blighted Property Within a Blighted Area Pursuant to an Adopted Redevelopment Plan Is a Public Use

A. Blight Is an Area Concept

While Petitioners do not controvert that the removal of blight is a public use, their assertion that "there is nothing in the act of condemning non-blighted properties that constitutes a public purpose" (Petitioners' Brief at 26) overlooks this Court's holding in Berman that the concept of blight applies to a redevelopment project area as a whole and not to individual properties. Under Berman, individual, parcel-specific determinations of blight are unnecessary. Regardless of the character of the specific parcel condemned, when the purpose of the agency's condemnation is blight removal in a designated redevelopment project area, the taking is for a public use. As this Court explained:

> Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis – lot

by lot, building by building. *Berman, supra*, at 35-36.

The public policy reasons for dealing with blight on an area-wide basis have been explained in the legislative findings accompanying the California Community Redevelopment Law. The California legislature has found that "conditions of blight are chiefly found in areas subdivided into small parcels, held in divided and widely scattered ownerships, frequently under defective titles, and in many such instances the private assembly of the land in blighted areas for redevelopment is so difficult and costly that it is uneconomic and as a practical matter impossible for owners to undertake because of lack of the legal power and excessive costs." Cal. Health & Safety Code § 33036(c).

The conditions found in most urban centers make it virtually impossible for a private developer acting without the assistance of a redevelopment agency possessing the power of eminent domain to assemble a site large enough for modern development. Descriptions of these conditions are found throughout California case law dealing with the redevelopment of blighted areas. *See, e.g., Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 782-84, 266 P.2d 105, 109-12 (Cal. App. 1954) ("*Hayes*"); and *In re Redevelopment Plan for Bunker Hill*, 61 Cal. 2d 21, 33-35, 45, 389 P.2d 538, 545-48, 553-54, (1964). Dealing effectively with these conditions would be impossible if the owners of a few non-blighted parcels within a redevelopment project area could refuse to sell their property or hold a project hostage by demanding an inflated price. (For a more detailed discussion of the "hold-out problem" *see* Respondents' Brief at section II B.) For this reason, using the power of eminent domain to acquire non-blighted property within a

redevelopment project area is critical to the success of redevelopment efforts.

B. Requiring Parcel-By-Parcel Findings of Blight Would Severely Undermine California's and Other States' Urban Redevelopment Efforts

California's Community Redevelopment Law permits the condemnation of non-blighted parcels in a predominantly blighted area for the purpose of redevelopment.[3] The authorizing statute provides that a project area may include property which is not detrimental to the public health, safety or welfare, but whose inclusion is necessary for the effective redevelopment of the area. Cal. Health & Safety Code § 33321. California courts have consistently applied both this statute and the holding in *Berman* to sustain the taking of non-blighted parcels in a designated redevelopment project area. *See Redevelopment Agency v. Rados Bros.*, 95 Cal. App. 4th 309, 315, 115 Cal. Rptr. 2d 234, 239 (Cal. App. 4th Dist. 2001) (holding that the trial court improperly applied a blight concept to the property owner's individual parcel) ("*Rados Bros.*"); *Fellom v. Redevelopment Agency of San Francisco*, 157 Cal. App. 2d 243, 247, 320 P.2d 884, 887 (Cal. App. 1st Dist. 1958) (holding that California Redevelopment Law as applied to non-slum-type blighted areas is constitutional); *Hayes*,

[3] *See also* 2A NICHOLS ON EMINENT DOMAIN § 7.06[27] n. 25 and 26 (2004) (listing the following states as finding that non-blighted properties may be taken to prevent slums and clean up blighted areas: California, Connecticut, Illinois, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Virginia, Washington, and Wisconsin).

supra, 122 Cal. App. 2d at 800, 266 P.2d at 120 (holding that California Redevelopment Law is constitutional as applied to non-slum-type blighted areas or to undeveloped, vacant land areas).

Requiring parcel-by-parcel findings of blight or imposing a higher level of scrutiny on the taking of non-blighted property in a redevelopment project area would severely undermine state redevelopment efforts throughout the country. Numerous states have followed this Court's holding in *Berman* and found that redevelopment of blighted areas need not occur on a piecemeal basis. *See State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 889 (Fla. 1980) (holding that the condemnation of buildings that do not contribute to the slum or blight of an area is constitutional for the purpose of community blight removal); *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (2003), *cert. denied*, 124 S. Ct. 1603 (2004) (holding that redevelopment encompasses an entire area, not just individually blighted sections); *Wilson v. Long Branch*, 27 N.J. 360, 381, 142 A.2d 837, 849 (1958) ("Denial of the right of the municipality to draw within a blighted area certain houses or buildings which are in good condition, would be in some instances to defeat the overall legislative purpose, namely, the redevelopment of blighted areas."); *Charleston Urban Renewal Auth. v. Courtland Co.*, 203 W. Va. 528, 532, 509 S.E.2d 569, 573 (1998) (" . . . the issue is not whether an individual property is 'slum' or 'blighted' property. The issue is whether an 'area,' typically composed of many individual parcels of property, is a slum or blighted area."); *Sigma Tau Gamma Fraternity House Corp. v. Menomonie*, 93 Wis. 2d 392, 409, 288 N.W.2d 85, 92-93 (Wis. 1980) ("If the area in which plaintiff's property is located is blighted, and if the

acquisition of plaintiff's property is reasonably necessary for the elimination of that blight, then the city may lawfully condemn plaintiff's property, despite the fact that that property itself has been properly maintained and is presently in satisfactory condition.").

II. As Demonstrated by California Community Redevelopment Law, States Adopt Procedural and Substantive Safeguards That Protect Against Abuses of the Eminent Domain Power

State and local officials adopt procedural and substantive safeguards that protect against abuses of the eminent domain power. As envisioned under the separation of powers doctrine, courts diligently enforce these provisions and assure that local agencies heed these legislative protections. These procedural and substantive constraints balance the legitimate interests of local agencies to pursue projects that enhance the general health and welfare of the community with the private individual interests of those affected by such projects. Because amicus is most familiar and qualified to discuss California Redevelopment Law, this section focuses on the constraints found on the use of eminent domain in the California Community Redevelopment Act. However, substantive and procedural limits in varying forms are imposed in urban renewal statues throughout the country.[4]

[4] More pointedly, procedural and substantive constraints also exist in Connecticut's General Statutes controlling the exercise of eminent domain for economic development. *See* Respondents' Brief at Summary of Facts and Section II B. (City of New London held numerous neighborhood meetings before adopting the Municipal Development Plan, the plan required specific details regarding the

(Continued on following page)

A. California's Community Redevelopment Law Contains Both Procedural and Substantive Provisions Designed to Protect the Interests of Property Owners in Redevelopment Project Areas

In recognition of the authority vested in redevelopment agencies and the potential for the abuse of that authority, the California Community Redevelopment Law contains provisions designed to protect the interests of property owners. In connection with the adoption of the redevelopment plan, the elected legislative body is required to make findings that the redevelopment project area is a blighted area based on the existence of specifically identified conditions of both economic and physical blight. Cal. Health & Safety Code § 33367. Blight is rigorously defined as a combination of enumerated conditions,[5] which are so prevalent and so substantial that it causes a reduction of, or lack of proper utilization of the area to such an extent that it constitutes a serious physical and economic burden on the community which cannot be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment. *Id.* § 33030.[6] Land does not qualify as being blighted merely because it is not being put

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needs for development and the benefits of the proposed plan and also imposed both city and state oversight on development.)

[5] Such conditions include unsafe or abandoned buildings, high crime rates, incompatible uses of adjacent properties, depreciated or stagnant property values or impaired investments, abnormally high business vacancies and a lack of necessary commercial facilities. *Id.* § 33031; *Rados Bros., supra,* 95 Cal. App. 4th at 314, 115 Cal. Rptr. 2d at 239.

[6] Additional findings that must be made include the necessity of condemnation, economic feasibility of the redevelopment plan, adequacy of the relocation plan, and the fact that the project area is predominately urbanized. *Id.* § 33367.

to its optimum use or may be more valuable for other uses. *Sweetwater Valley Civic Assn. v. National City*, 18 Cal.3d 270, 277-78, 133 Cal. Rptr. 859, 863 (1976).

Procedural safeguards guide the redevelopment process in general and the exercise of eminent domain in particular. California law provides that both the redevelopment agency and legislative body conduct public hearings prior to approving the redevelopment plan. Cal. Health & Safety Code §§ 33348, 33360. If the redevelopment plan would subject any property in the project area to acquisition by purchase or condemnation, the agency must send a statement explaining this to each property owner with the notice of hearing. *Id.* § 33350. The description of the goals and objectives of the redevelopment plan and notice of authority to condemn property, if any, must be in non-technical, easily understood language. *Id.* §§ 33349, 33350. Specific procedures must be followed if written objections to the plan are submitted. The legislative body must address objections in detail and give reasons for not accepting specified objections and suggestions, using a good faith reasoned analysis in its response, supported by factual information. *Id.* § 33363.

If the proposed redevelopment plan contains the authority to acquire residential property, and substantial numbers of low- or moderate-income persons reside within the project area, or the project will displace a substantial number of people, an independently elected "project area committee" including representatives of property owners must review the redevelopment plan prior to its adoption and make a recommendation to the legislative body. *Id.* §§ 33347.5, 33385. If the project area committee recommends against adoption of the redevelopment plan, the

redevelopment plan may only be adopted by an extraordinary majority vote of the legislative body. *Id.* § 33366.

The ordinance adopting the redevelopment plan and the validity of the findings and conclusions of the legislative body must be supported by substantial evidence in the record of proceedings and are subject to legal challenge and referendum. Cal. Health & Safety Code §§ 33501, 33365; *Gonzales v. City of Santa Ana*, 12 Cal. App. 4th 1335, 1343-45, 16 Cal. Rptr. 2d 132, 137-38 (Cal. App. 4th Dist. 1993).

After the redevelopment plan is adopted, the agency must record in the land records of the county in which the redevelopment project is situated, a description of the land within the project area and a statement that proceedings for the redevelopment of the project area have been instituted. *Id.* § 33373. Purchasers of property in the redevelopment project area after the redevelopment plan is adopted are thereby given constructive notice that the property they are acquiring may be subject to acquisition by eminent domain for redevelopment purposes.

Each redevelopment plan is required to "provide for participation in the redevelopment of property in the project area by the owners of all or part of such property if the owners agree to participate in the redevelopment in conformity with the redevelopment plan. . . ." *Id.* § 33339. Redevelopment agencies must also extend reasonable preferences to persons engaged in business in the project area to reenter in business within the redeveloped area if they otherwise meet the requirements prescribed by the redevelopment plan. *Id.* § 33339.5.

Before a redevelopment agency may condemn property, it must make every reasonable effort to acquire the

property voluntarily, including having the property appraised and offering to purchase the property for not less than the appraised fair market value. Cal. Gov't Code §§ 7267.1, 7267.2. If the property owner refuses the redevelopment agency's offer, before proceeding to condemnation the agency must adopt a resolution declaring the public use and necessity of the taking. Cal. Civ. Proc. Code § 1245.220. The property owner must receive notice of the adoption of this "resolution of necessity" and have an opportunity to appear and refute the required findings. *Id.* § 1245.235. The resolution of necessity may only be adopted by a vote of two-thirds of all the members of the governing body. *Id.* § 1245.240.

Finally, an agency is prohibited from acquiring property to remain in its current condition merely to effect a change in ownership. Cal. Health & Safety Code § 33394.

This detailed statutory scheme has built a substantive and procedural fence around the use of eminent domain by redevelopment agencies that provides an extraordinary level of protection to property owners from the abuse of that power.

B. Courts Will Invalidate Takings That Violate Legislatively Imposed Procedural and Substantive Safeguards

Courts enforce the legislative protections discussed above. Courts have rejected redevelopment plans where there is no substantial evidence in the record that the project area is predominately blighted. *See Sweetwater Valley, supra*, 18 Cal. 3d at 278-79, 133 Cal. Rptr. at 864 (finding that the property in a redevelopment project area, which included a golf course and vacant land, was neither

an economic nor a social liability substantiating a finding of blight); *Regus v. City of Baldwin Park*, 70 Cal. App. 3d 968, 139 Cal. Rptr. 196 (Cal. App. 2nd Dist. 1977) (record failed to show project area was blighted); *Emmington v. Solano County*, 195 Cal. App. 3d 491, 497-98, 237 Cal. Rptr. 636, 640 (Cal. App. 1st Dist. 1987) (courts role is to ensure that the factors to be considered in determining whether an area is blighted are taken into account and not just "rubber stamp" local government findings.)[7]

For example, in *Barbara Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App. 4th 388, 95 Cal. Rptr. 2d 265 (Cal. App. 2d Dist. 2000) the court concluded that the proposed redevelopment project failed to establish blight due to a lack of substantial supporting evidence in the administrative record. The court held that in order to establish blight, reports must discuss specific defects in specific parcels and not just recite the statutory language.

[7] Two Federal District Court cases cited by Petitioners, *99 Cents Only Stores, Inc. v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *appeal dismissed and remanded*, 60 Fed. Appx. 123 (9th Cir. 2003) and *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) made an "end run" around state condemnation procedures, probably based in part on a perception that property owners would fare better in federal court on challenging a right to take. (Petitioners' Brief at 14, 16.) Both cases involved redevelopment agencies' condemnation of allegedly non-blighted property within a redevelopment project area and rested in part on allowing a challenge to the agencies' determinations of blight. In both cases, the district courts expressly declined to address the blight findings made pursuant to California Redevelopment Law and neither case cited nor acknowledged the holding in *Berman* permitting the taking of non-blighted properties for the purpose of redevelopment. Compare these cases with *Aaron v. Target Corp.*, 357 F.3d 768 (8th Cir. 2004) holding that the district court abused its discretion when it declined to abstain and permit a state eminent domain action to go forward.

Recently, in *Graber v. City of Upland*, 99 Cal. App. 4th 424, 121 Cal. Rptr. 2d 649 (Cal. App. 4th Dist. 2002) the court reinforced earlier precedent finding inadequate evidence of blight and criticized the use of overbroad definitions which prevented the city council from determining whether the project area could truly be characterized as having the blight conditions required by statute.[8]

Similarly, in *Redevelopment Agency v. Norm's Slauson*, 173 Cal. App. 3d 1121, 219 Cal. Rptr. 365 (Cal. App. 2d Dist. 1985), the court rejected a resolution of necessity where the contents of the resolution were affected by a gross abuse of discretion by the legislative body.[9] In *Norm's Slauson*, the court found that the adoption of the resolution of necessity to acquire the property for a redevelopment project was a "sham" because the city had already irrevocably committed itself to condemnation of the parcel. *Id.* at 1127, 219 Cal. Rptr. at 369. Prior to the hearing on whether the city council should adopt the resolution of necessity, the agency had contracted to sell the property and issued bonds to finance development (without notifying the property owner). *Id.* at 1127, 219 Cal. Rptr. at 369.

[8] *See also Friends of Mammoth, et al. v. Town of Mammoth Lakes Redevelopment Agency*, 82 Cal. App. 4th 511, 98 Cal. Rptr. 2d 334 (Cal. App. 3d Dist. 2002) (rejecting a redevelopment plan on the grounds that the project did not meet the predominantly urbanized requirement).

[9] A resolution of necessity to condemn a particular piece of property must contain the following four findings: (1) the public interest and necessity require the project; (2) the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; (3) the property sought to be acquired is necessary for the project; and (4) the agency has made the offer of just compensation required by Government Code section 7267.2 or the offer was not made because the owner could not be found with reasonable diligence. Cal. Civ. Proc. Code § 1245.230.

The court explained that before a local legislative body determines that it is necessary to take a particular parcel of property, it must "conduct a fair hearing and make its determinations on the basis of evidence presented in a judicious and nonarbitrary fashion." *Id.* at 1129, 219 Cal. Rptr. at 370.

In *Redevelopment Agency v. Herrold*, 86 Cal. App. 3d 1024, 150 Cal. Rptr. 621 (Cal. App. 5th Dist. 1978) the court held that the 60-day statute of limitations to challenge a redevelopment plan did not bar a claim alleging illegal implementation of the plan. At issue was whether the agency violated section 33394 of the Health and Safety Code which prohibits a redevelopment agency from taking property that will remain in the same condition merely to effect a change in ownership. The court overruled the trial court's determination that the claim was time-barred. The court explained, "[the statute of limitations] cannot be used to immunize an agency which adopts a redevelopment plan legal on its face, then after the 60-day period has elapsed deviates from its resolved purpose and seeks to violate the public use requirement of [the] California Constitution. . . ." *Id.* at 1029, 150 Cal. Rptr. at 625.

As evidenced by the above, while courts give great deference to legislative declarations of public use, they enforce the procedural and substantive safeguards that protect against abuses of the eminent domain power. This separation of powers provides the proper balance between legislative findings of public use that authorize the exercise of eminent domain to implement comprehensive redevelopment projects benefiting the general health and welfare of the community, while at the same time ensuring

judicial protection of individual property interests should an agency misuse such authority.

CONCLUSION

For the reasons set forth above, CRA urges this Court to re-affirm its holding in *Berman* that non-blighted property located within a blighted area may be taken by eminent domain in order to alleviate conditions of blight which exist in the area as a whole and reject any standard of review that would impose the need for parcel-by-parcel determinations of blight.

Respectfully submitted,

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